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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 430

JAMES SAILORS, ET AL., APPELLANTS,

v.

THE BOARD OF EDUCATION OF THE COUNTY OF KENT, ET AL., APPELLEES.

On Appeal from the United States District Court for the Western District of Michigan, Southern Division

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BRIEF FOR APPELLEE THE BOARD OF EDUCATION OF THE COUNTY OF KENT AND THE INDIVIDUAL APPELLEES AS MEMBERS THEREOF

QUESTION PRESENTED

Is the composition of local units of government [such as county (intermediate) school boards of education] a state matter and not a subject within the jurisdiction of this Court?

From the commencement of this action, February 15, 1963, appellees have contended that the Court lacks jurisdiction over the subject matter and that the complaint, as amended, fails to state a claim upon which relief can be granted (R. 107, 110, 117, 119, 120, 195).

On the merits below, the issue was presented to the District Court, as follows:

> "2. Is the composition of local units of government, such as county (intermediate) school boards of education, a state matter and not a subject within the jurisdiction of the Court?" (R. 195)

ARGUMENT

The composition of local units of government is a state matter and not a subject within the jurisdiction of this Court.

This Court has never concerned itself with disputes over the local allocation of government functions and powers.

Mr. Justice Frankfurter, in his dissent in *Baker v Carr*, 369 US 186, 7 L ed 2d 663, 82 S Ct 691 (1962), discusses the "consistent refusal of this Court to find that the federal Constitution restricts state power to design the structure of state political institutions * * *" (Note 23, 369 US 290, 7 L ed 2d 728, 82 S. Ct. 750).

District Judge Stephen J. Roth in *Johnson v Genesee County, Michigan*, 232 F Supp 567 (1964), at page 570, said:

> "Neither the Fourteenth Amendment, nor Article 4 of the Constitution of the United States, has so far been interpreted by the Supreme Court of the United States to require the apportionment of local legislative bodies in a state in accordance with population."

Judge Roth concluded (232 F Supp 572):

> "Under the prevailing view of the United States Supreme Court, as we have pointed out above, the composition of local units of government is held to be a state matter. Under the rule of stare decisis, this Court is not free to consider the subject of the apportionment of representation on local legislative bodies. It may well be that the time will come when the application of the Fourteenth Amendment will be extended that far. The more likely development is that the June 15, 1964, rulings of the Supreme Court in cases dealing with the state legislatures of Alabama, New York, Maryland, Delaware, Virginia and Colorado will result in legislatures in our states which will be proportionately representive of people, and therefore, likely to themselves establish in local legis-

lative bodies a vastly different balance between people and governmental power."

In *Sailors* below, 254 F Supp 17, Chief District Judge W. Wallace Kent, writing with the concurrence of Circuit Judge Clifford O'Sullivan, said at 28-29:

> "The matter of malapportionment of boards and agencies of the states and their subsidiaries has not yet been before the United States Supreme Court. We recognize the impact of the cases to which reference is made in Judge Fox's opinion, but do not agree that the decisions to which reference is therein made require the District Courts of the United States to review the manner of apportionment and constitution of each and every board and agency of the several states, cities, villages, counties, parishes, townships, metropolitan districts, and all other such policy and decision making bodies which are in existence for the purpose of carrying out the intent of the legislatures which authorize their creation.
>
> "*Reynolds v Sims*, 377 US 533, 84 S Ct 1362, 12 L ed 506, is unquestionably authority for the 'one man one vote' premise to be used in the apportionment of state legislatures. Citations of authority have been given in Judge Fox's opinion which he concludes would authorize the imposition of this same premise upon every agency of every body of government in existence in this country today. With this we are not in accord."

Judge Kent continued: "We prefer the result reached in *Johnson v Genesee County, Michigan*, 232 F Supp 567" and then quoted Judge Roth as above.

All of the cases since *Baker v Carr* and *Reynolds v Sims* have involved only the apportionment of congressional districts and state legislatures on the one man one vote doctrine.

Although concededly in another context, this Court said in *Reynolds v Sims*, 377 US 533, 575, 12 L ed 2d 506, 535, 84 S Ct 1362, 1388:

> "Political subdivisions of States — counties, cities, or whatever — never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter v City of Pittsburgh*, 207 US 161, 178, 52 L ed 151, 159, 28 S Ct 40, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] * * * and the territory over which they shall be exercised rests in the absolute discretion of the State.'"

Because of its relevancy to the case at bar and for the convenience of the Court, we attach as Appendix A the full opinion of Circuit Judge Harry Phillips in *Strickland v Burns*, 256 F Supp 824, 836 (1966), who concludes that the Federal Courts should not be concerned with the composition of local units of state government.

The confusion abounding today throughout the courts of our Country with reference to the interpretation and effect of *Baker v Carr*, *Reynolds v Sims* and their progeny, is perhaps best illustrated by the decisions of the Supreme Court of Michigan in *Brouwer v Kent County Clerk*, 377 Mich 616, and *Muskegon Prosecuting Attorney v Klevering*, 377 Mich 666, decided April 5, 1966.

In commenting on *Gray v Sanders*, 372 US 368, 9 L ed 2d 821, 83 S Ct 801, Mr. Justice Black, speaking for the Court in *Fortson v Morris*, 385 US 231, 233-34, 17 L ed 2d 330, 332-33, 87 S Ct 446, 448, said:

> "* * * This case, as was emphasized, had to do with the equal right of 'all who participate in the election', 372 US, at 379, 9 L ed 2d at 829, to vote and have

their votes counted without impairment or dilution. But as the Court said, 372 US, at 378, 9 L ed 2d at 829, the case was 'only a voting case'. Not a word in the Court's opinion indicated that it was intended to compel a State to elect its governors or any other state officers or agents through elections of the people rather than through selections by appointment or elections by the State Assembly. It is wrongly cited as having either expressly or impliedly decided that a State cannot, if it wishes, permit its legislative body to elect its Governor."

"* * * There is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor. * * *"

There is no provision in the United States Constitution or any of its amendments, neither is there any decision of this Court, dictating or compelling a State to elect every board and agency created for its better government, rather than through selections, such as the method adopted for the selection of Michigan county boards of education in the instant case.

See Appellants' brief, Appendix C, page 2a. through 5a.

We are concerned with the extension of the political theory of *Baker v Carr* and *Reynolds v Sims* into the field of local units of state government, as well as with the effect of such extension.

Jack V. Weinstein explores the effect in his article "The Effect of the Federal Reapportionment Decisions on Counties and other Forms of Municipal Government", 65 *Columbia Law Review* 21.

We do not agree with Mr. Weinstein's conclusions, stated at page 49. Neither do we agree with the Honorable Thurgood Marshall, Solicitor General, "* * * that, as a matter of constitutional principle, logic and sound policy, the principles of *Reynolds* apply to local governmental bodies whose members are elected from districts and re-

quire that those districts be substantially equal in population." Memorandum for the United States as Amicus Curiae in *Avery v. Midland County Texas*, 406 SW 2d 442, on Petition for a Writ of Certiorari to the Supreme Court of Texas, October Term, 1966, No. 958.

R. W. Nahstoll, writing in the American Bar Association Journal "The Role of the Federal Courts in the Reapportionment of State Legislatures", after *Baker v Carr*, concluded (50 American Bar Association Journal 842, at 847):

> "The hazard from diminution of state government is not primarily the risk of offense taken by the states on account of some vague 'invasion of sovereignty'. The hazard is that it will preclude or discourage pragmatic experimentation into political ways and means which characterizes a viable government. In an earlier day, the Court observed:
>
> > " 'The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.' [*Anderson v Dunn*, 6 Wheat. (19 US) 204, 226.]
>
> "The significance of that experimentation was dramatically revealed by the talented British observer, James Bryce:
>
> > " 'It has been truly said that nearly every provision of the Federal Constitution that has worked well is one borrowed from or suggested by some State Constitution; nearly every provision that has worked badly is one which the Convention, for want of a precedent, was obliged to devise for itself.' [1 Bryce, American Commonwealth 35 (3d ed).]
>
> "Dicey once characterized the United States as 'A nation concealed under the form of a federation.'

[Dicey, Introduction to the Law of the Constitution, (9th ed 1939) App. 604] *Baker v Carr* moves inescapably to confirm that observation. It does more than move from the states to the Federal Government jurisdiction over problems now of national scope. It tends to undermine the health of state government, and its consequences should not be underrated."

If the Court applies the principles of *Reynolds* to the composition of local units of government, this will be the final move from the states to the federal government jurisdiction over matters which historically have been considered to be only of state concern and consequently the health of state government will be undermined.

In *Reynolds v Sims* and its progeny, the Court has entered the "political thicket" at the congressional and legislative levels. See Mr. Justice Frankfurter's remark in *Colgrove v Green*, 328 US 556, 90 L ed 1432, 66 S Ct 1198. The question now presented is whether the Court will invade this new political thicket and open a Pandora's box.

The cases before the Court do require "reflection on political theory" (50 American Bar Association Journal 842).

The Federal Courts should not be required "to review the manner of apportionment and constitution of each and every board and agency of the several states, cities, villages, counties, parishes, townships, metropolitan districts, and all other such policy and decision making bodies which are in existence for the purpose of carrying out the intent of the legislatures which authorize their creation" (*Sailors*, 254 F Supp 28).

As Judge Phillips in *Strickland* and Judge Roth in *Johnson* suggested, the Court should not assume that legislatures reapportioned on a constitutional basis will fail to correct any malapportionment that may exist in its arms, agencies and instrumentalities, when corrective measures are needed.

The Michigan legislature has been reapportioned on the one man one vote principle. As pointed out by Appellants, the Michigan school code does "authorize popular election of county school board members upon a favorable referendum vote within the county." Appellants' brief, page 15, Note 20 and Appendix E, pages 6a and 7a. However, Appellants complain that this provision is meaningless. This argument should be addressed to the Michigan legislature and not to this Court.

We urge the Court to forthrightly hold that the composition of local units of government is a state matter and not a subject within the jurisdiction of this Court or the Federal Courts and further that the one man one vote doctrine applies only to the composition of congressional districts and state legislatures.

CONCLUSION

Appellee The Board of Education of the County of Kent and the individual appellees as members thereof, urge the Court to affirm the order entered below dismissing the Complaint, as amended [R. 223, 224].

March 10, 1967.

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APPENDIX A

Strickland v. Burns,
256 F Supp 824, 836 (1966)

HARRY PHILLIPS, Circuit Judge (sitting as district judge by designation), (dissenting):

I do not agree that the "on man, one vote" rule applies to the Rutherford County School Commission, which is a local administrative agency created by the Legislature to administer the affairs of the county school system.

The Tennessee apportionment statute now provides for reapportionment of the Legislature upon the basis of population in accordance with Reynolds v. Sims, 377 U.S. 533, 74 S.Ct. 1362, 12 L.Ed. 2d 506, and Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663. Under the latest decision in Baker v. Carr, 247 F. Supp. 629 (M.D.Tenn.), the General Assembly which will be elected in November 1966 and which will convene on the first Monday in January 1967 will be a validly apportioned body under the "one man, one vote" rule.

In Tennessee a school board or district is an arm or instrumentality of government subject to the unlimited control of the Legislature. Taylor v. Taylor, 189 Tenn. 81, 222 S.W.2d 372; Kee v. Parks, 153 Tenn. 306, 309, 283 S.W. 751. It is "under the control of the legislature, so that it may be abolished, or its power may be enlarged or its responsibilities increased, at any time, by that body, without the danger of encountering constitutional difficulties." Edmondson v. Board of Education, 108 Tenn. 557, 561, 69 S.W. 274, 275, 58 L.R.A. 170. It has "no rights which the legislature may not subsequently modify or abrogate." Cunningham v. Broadbent, 177 Tenn. 202, 207, 147 SW.2d 408, 410; Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015; City of Trenton v. State of New Jersey, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937.

Further, the powers of the Rutherford County School Commission are administrative, not legislative, in character. It does not have the power of taxation, nor could such authority be delegated to it by the Legislature. Williamson v. McClain, 147 Tenn. 491, 249 S.W. 811; Waterhouse v. Cleveland Public Schools, 68 Tenn. 398. It is not authorized to adopt ordinances or otherwise exercise legislative powers. Although created by private statute, Chapter 426, Private Acts of 1943, its powers are controlled by the general school laws of the State, TCA, Title 49, by the General Education statute enacted biennially by the Legislature (see, e. g., Ch. 76, Public Acts of 1965; Ch. 39, Public Acts of 1963), and by rules and regulations promulgated by the State Board of Education.

We cannot assume that the Tennessee Legislature, which now has been reapportioned on a constitutional basis, will fail to correct any malapportionment that may exist in its arms, agencies and instrumentalities, when corrective measures are needed. I do not read Reynolds v. Sims, supra, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, and Baker v. Carr, supra, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663, as construing the Fourteenth Amendment to require extension of the "one man, one vote" rule to *every* local election, and particularly the election of local agencies possessing no legislative powers. See Weinstein, The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 65 Colum.L.Rev. 21.

Once the Legislature is validly constituted, I do not believe there is a constitutional requirement that personnel of its subservient arms and agencies, created to perform purely administrative functions, must be elected on the "one man, one vote" basis.

In my opinion the election of members of the Rutherford County School Commission, in accordance with the private statute here involved, does not violate rights secured to plaintiffs by the Fourteenth Amendment. Glass v. Hancock County Election Commission, 250 Miss. 40, 156 So.2d 825, appeal dismissed, 378 U.S. 558, 84 S.Ct. 1910, 12 L.Ed.

2d 1035; Tedesco v. Board of Supervisors of Elections, La.App., 43 So.2d 514, appeal dismissed for want of a substantial federal question, 339 U.S. 940, 70 S. Ct. 797, 94 L.Ed. 1357; Lynch v. Torquato, 343 F.2d 370 (C.A.3); Moody v. Flowers, 256 F.Supp. 195, (M.D.Ala.); Johnson v. Genesee County, Michigan, 232 F.Supp. 567 (E.D.Mich.).

I would dismiss the complaint.